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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NATIONAL NOTARY ASSOCIATION,

Plaintiff and Respondent,

v.

U.S. NOTARY et al.,

Defendants and Appellants.

D038278

(Super. Ct. No. 720152)

APPEAL from a judgment of the Superior Court of San Diego County, J. Richard Haden, Judge. Affirmed as modified; sanctions motion denied.

Plaintiff sued its competitor under Business and Professions Code section 17200 for violating federal law prohibiting the transmission of unsolicited facsimile (fax) advertisements. In a prior appeal, we upheld the trial court's summary adjudication in plaintiff's favor on the liability issue, but ordered the trial court to reexercise its discretion

in determining the appropriate equitable remedy based on a proper assessment of the summary judgment record.

On remand, the trial court permanently enjoined defendants from faxing any unsolicited advertisement that violated federal law (47 U.S.C. § 227),¹ and stated the injunction applied to faxes sent "anywhere in the United States of America" Defendants again appeal, contending the injunction is unreasonably broad and violates the federal Constitution's Commerce Clause. After modifying the injunction to address several of defendants' concerns, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Lawsuit

National Notary Association (NNA), a California corporation, provides notary training seminars in various states, including California. U.S. Notary (USN), a California business, also holds notary training seminars in many states, but has never held a seminar in California. The two businesses conduct seminars in some of the same geographical markets, including Pennsylvania and Texas.

Beginning in January 1998, USN marketed its seminars by using out-of-state agencies to send five million unsolicited fax advertisements to prospective seminar

¹ Title 47 United States Code section 227(b)(1)(C) prohibits the "use [of] any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine" The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." (47 U.S.C. § 227(a)(4).) All further references to 47 United States Code section 227 shall be to section 227.

participants in approximately 40 different states (but not to California). Based on this conduct, NNA filed suit against USN and its officers (collectively USN), alleging USN's unsolicited fax advertisements violated: (1) Business and Professions Code section 17200 (section 17200); and (2) section 227(b)(1)(C). NNA sought (1) injunctive relief; (2) "disgorgement of the amount [USN] [has] been unjustly enriched"; and (3) \$500 per violation.

Each party moved for summary judgment. The court granted summary judgment in NNA's favor based on section 17200, denied NNA monetary relief, and enjoined USN from sending any unsolicited faxes "to or from" California. The court awarded NNA \$60,000 in attorney fees plus costs.

Both parties appealed.

B. The First Appeal

In our prior unpublished opinion, we held USN violated federal law because it directed the transmission of unsolicited fax advertisements (§ 227(b)(1)(C)), and therefore USN's conduct was actionable under section 17200. (*National Notary Association v. U.S. Notary* (October 31, 2000, D033829 [nonpub. opn.] (*National Notary Ass'n*)).) Although NNA was not the recipient of an unsolicited fax and therefore could not recover directly under federal law, we held the action was proper under section 17200 because this code section treats violations of other laws, including federal law, "as unlawful practices independently actionable" under California law. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565-567; *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 493.)

In so concluding, we rejected USN's argument that NNA failed to establish USN's liability under California's unfair competition law because all of USN's fax transmissions physically occurred outside of California. (*National Notary I, supra*, D033829.) We reasoned that California has a substantial interest in protecting its own resident businesses and ensuring they are not harmed by anti-competitive practices regardless of where the practices physically occur. (*Ibid.*; see *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1063; see also *Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1391.) We noted that NNA, a California corporation, competed in some of the same geographical markets as USN, and suffered injury when USN violated the law and obtained competitive advantage over NNA through its unlawful business practice. (*National Notary I, supra*, D033829.) We additionally concluded section 17200 applied because a substantial portion of the unlawful business practices occurred in California, including the decision to send the unsolicited faxes, the creation of the advertisement, the identification of the recipients and the profiting from the lower advertising costs. (*Ibid.*) We stated that California has a "legitimate and compelling interest in preserving the business climate free of [unlawful] and deceptive practices." (*Ibid.*, quoting *Diamond Multimedia Systems, Inc. v. Superior Court, supra*, 19 Cal.4th at p. 1064.)

With respect to remedy, we affirmed the trial court's denial of monetary relief, but declined to reach the issue of whether the trial court erred in limiting its order to only those faxes sent "into or out of" California. (*National Notary I, supra*, D033829.) Challenging this portion of the order in the prior appeal, NNA contended the injunction

provided no meaningful relief because there was no evidence USN had ever sent, or intended to send, unsolicited advertisements to or from California. (*Ibid.*) In examining this contention, we found the trial court had incorrectly concluded that USN had faxed unsolicited advertisements to and from California, and based on this interpretation, the trial court may have reasonably believed its limited remedy would provide NNA with all necessary relief. (*Ibid.*) We therefore concluded a remand was necessary "to provide the trial court with the opportunity to exercise its full discretionary authority based on an accurate assessment of the summary judgment record." (*Ibid.*) We did not set forth parameters for the trial court's exercise of discretion, noting that a trial court has broad discretion in imposing equitable remedies under section 17200 and that a court is not necessarily required to provide any injunctive relief. (*National Notary I, supra*, D033829; see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180 (*Cortez*).) We also remanded for the court to determine whether an attorney fees award continued to be warranted under the circumstances.

C. Proceedings on Remand

On remand, the trial court provided the parties the opportunity to file briefs on the issue of the proper scope of the injunction.

In its brief, USN urged the court not to order any injunctive relief, arguing that an injunction limiting its out-of-state conduct would violate the federal Constitution, particularly because NNA "identified only one location (somewhere in Pennsylvania) where NNA allegedly competed with [USN] for notary training services." NNA countered that a nationwide injunction was required to prevent "defendants' continuing

violation of law [and] their continuing unfair competition," and to promote "California's compelling state interest in maintaining a competitive business environment free from unlawful and deceptive business practices."

In its initial telephonic ruling, the court declined to issue any injunction, stating "[t]he parties ought to enlist the good offices of the courts of Pennsylvania and Texas for [any] conduct occurring in those states."

At the ensuing hearing, NNA's counsel directed the court to the factual record showing that USN's wrongful conduct was not limited to Pennsylvania and Texas, and instead there were "40 jurisdictions that these defendants are faxing it to" NNA's counsel further claimed USN's unlawful conduct had prevented NNA from expanding into additional states because USN's "unfair competition in California . . . allows [USN] to sell [the seminars] at a cheaper price than [NNA] can" In response, USN's counsel stated that although an injunction would "theoretically" be appropriate if there was evidence the parties competed in other states, "[w]e just have absolutely no showing of unfair competition outside the borders of California"

After taking the matter under submission, the trial court stated the record showed that USN has used three out-of-state agents to fax unsolicited advertisements into at least 43 states. The court thus "exercise[d] its discretion" to grant NNA an injunction under section 17200, "prohibiting Defendants from violating 47 U.S.C. § 227 by sending

unsolicited fax advertisements to or from or into any state."² The court rejected USN's argument that the injunction was improper because it had "'an extraterritorial effect.'" The court further denied NNA's attorney fees request under Code of Civil Procedure section 1021.5.

USN appeals, challenging the scope of the injunctive relief order.

DISCUSSION

Once a party establishes an unfair or unlawful business practice under section 17200, a trial court has "very broad" discretion in determining the necessity, form and scope of injunctive relief. (*Cortez, supra*, 23 Cal.4th at p. 180; see *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 775 (*Mosk*).) The court "may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition" (Bus. & Prof. Code, § 17203 (§ 17203).) These equitable powers "'include[] the authority to make orders to prevent such activities from occurring in the future. . . . An "order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple." [Citation.] [Citation.] Injunctive relief 'may be as wide and diversified as the means employed in perpetration of the wrongdoing.' [Citation.]" (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540.)

² The order read that defendants were permanently enjoined from: "[u]sing any 'telephone facsimile machine,' computer, or other device to fax, transmit, and/or disseminate, over the telephone wires, to telephone facsimile machines, computers, or other devices, anywhere in the United States of America, and its territories, any unsolicited advertisements, in violation of 47 U.S.C. § 227."

Moreover, assuming no constitutional impediment, the court has the authority to issue an injunction prohibiting a defendant from conducting its unfair or unlawful activities in other states. (§ 17203.) In 1991, the Legislature specifically amended section 17203 to make clear that injunctive relief may "encompass . . . out-of-state activity" (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at p. 570.) This amendment is consistent with the long-recognized principle that an injunction may properly have "an extraterritorial effect" (*Mosk*, *supra*, 201 Cal.App.2d at p. 776; see 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 232, p. 793.) Once a court has personal and subject matter jurisdiction over the defendants, "it is immaterial that the control it asserts over their actions extends beyond the boundaries of California. [Citations.] [¶] . . . 'A court with personal jurisdiction of the defendant may enjoin him from doing an act elsewhere'" (*Mosk*, *supra*, 201 Cal.App.2d at p. 776; see *A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 568; *Allied Artists Pictures Corp. v. Friedman* (1977) 68 Cal.App.3d 127, 137.)

Under these general principles, the trial court had ample basis to find that a nationwide injunction was necessary to end the controversy and ensure that USN would not continue to engage in conduct that violates federal law and harms NNA. Based on USN's assertions in its briefs and at the hearing, the court had a substantial basis to conclude that USN would not change its practice of sending out unsolicited advertisements and planned to continue to do so. Without an injunction preventing USN from transmitting faxes throughout the United States, NNA would have no avenue to prevent USN from continuing the unlawful conduct that harmed NNA's business

interests, and NNA would be left in exactly the same position it was before the lawsuit, unless it filed a new lawsuit.

Relying on *Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214 (*Norwest Mortgage*), USN argues that despite section 17203's expansive reach, California does not have a sufficient interest in issuing an injunction that affects USN's activities conducted solely outside the state. In *Norwest Mortgage*, this court held the trial court erred in certifying a class of out-of-state residents asserting a section 17200 class action claim challenging the defendants' conduct that was committed wholly outside our state's borders. (*Norwest Mortgage, supra*, at pp. 222-225.) We held the Legislature did not intend liability under section 17200 to include a claim alleging only "out-of-state conduct causing out-of-state injury." (*Norwest Mortgage, supra*, at p. 223, fn. 10.)

Norwest Mortgage is not controlling here because the court expressly limited its holding to the liability issue under section 17200, and made clear that it was not considering the broader scope of remedial relief under section 17203. (See *Norwest Mortgage, supra*, 72 Cal.App.4th at p. 223-224.) Further, USN's reliance on *Norwest Mortgage* is misplaced because the facts here are different. Unlike *Norwest Mortgage*, USN's conduct was not committed wholly outside the state. In our prior decision in this case, we upheld the trial court's section 17200 liability finding based on facts showing a significant portion of USN's wrongful conduct occurred in California, including the management decisions to commit the wrongful conduct and the implementation of those decisions (i.e., the creation of the fax design and the receipt of the customer funds). (*National Notary I, supra*, D033829.) Moreover, the undisputed facts showed USN's

unlawful conduct detrimentally affected a California corporation. (*Ibid.*) NNA proved it suffered injury when USN violated the law by sending an out-of-state fax and that USN obtained a competitive advantage over NNA through its unlawful business practice.

(*Ibid.*)

These facts likewise guide our analysis of the appropriate scope of the remedial injunction. Although the injunction extends to USN's out-of-state activities, the injunction also has a substantial relationship with California's legitimate interests because it (1) prevents USN from committing federal law violations within our state's borders; and (2) prevents USN from obtaining an unfair competitive advantage over NNA in states where the two parties conduct seminars and/or compete for seminar attendees. Thus, for example, if USN uses its California offices to direct unsolicited faxes to be sent between Florida and Oregon, NNA would be entitled to enforce its order in California because the "nerve center" of the wrongful conduct occurred in California. California has a legitimate interest in preventing businesses within its borders from violating federal law. Similarly, if USN sends an unsolicited fax from Arizona to Pennsylvania, where the two parties have conducted seminars, California would have a legitimate interest in enforcing the injunction to ensure that USN did not obtain an unfair competitive advantage over a California corporation through its illegal conduct. Likewise, if USN sends an unsolicited fax from Arizona to a state where the two parties compete for seminar attendees (i.e., an attendee may live in New Jersey but attend a seminar in Pennsylvania), California has the same legitimate interest.

But to the extent that the injunction does not have these identified connections to a valid state interest, the injunction is too broad. Specifically, a California court would have no reasonable basis for preventing USN's violation of federal law if (1) the unsolicited fax was not sent to or from California; (2) USN did not direct any of the wrongful conduct from California; *and* (3) USN's unsolicited fax was transmitted to a state where NNA does not conduct seminars or compete for seminar attendees. To ensure the injunction is reasonably related to California's legitimate sphere of interests, we shall modify the injunction to reflect these limitations. (See Disposition section, *infra*.) With these modifications, we conclude the injunction is not unreasonably broad and has a sufficient nexus to California's legitimate interests.

USN additionally contends the injunction violates the federal Constitution's Commerce Clause, and other fundamental constitutional principles of state sovereignty, state comity and federalism.³

The federal Constitution's Commerce Clause "limits the states' power to regulate . . . interstate . . . commerce" (*Pacific Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 503, 514; see *Barclays Bank v. Franchise Tax Bd. of California* (1994)

³ We reject NNA's argument that USN is barred from raising these issues by the law of the case doctrine. In the first appeal, we did not reach the question of the validity of a nationwide injunctive relief order, and instead our brief discussion of the Commerce Clause was limited to the liability issue. (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893.) We also reject NNA's contention that USN waived its right to raise the constitutional issues on appeal. USN did sufficiently raise these arguments in its written papers below.

512 U.S. 298), and prohibits states from "discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." (*Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.* (1994) 511 U.S. 93, 98; see *Ferguson v. Friendfinders, Inc.* (2002) 94 Cal.App.4th 1255, 1261-1262.) The Commerce Clause precludes a state from expanding its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states and "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (*Healy v. The Beer Institute* (1989) 491 U.S. 324, 336-337.) But the Commerce Clause does not prohibit a state from enforcing a federal law or prohibiting conduct beyond its borders if the prohibition has been expressly authorized by Congress. (See *Pacific Merchant Shipping Assn. v. Voss, supra*, 12 Cal.4th at p. 514; see *Atlantic Coast Demo. v. Bd. of Chosen Freeholders* (3d Cir. 1995) 48 F.3d 701, 710; *Norfolk Southern Corp. v. Oberly* (3d Cir. 1987) 822 F.2d 388, 392.)

The trial court's injunction does not violate the Commerce Clause because the injunction's sole purpose and effect is to enforce federal law, and therefore does not improperly burden or discriminate against interstate commerce. Although the vehicle for NNA's legal claim is a state statute (section 17200), the essence of NNA's cause of action and the court's injunctive relief order concerned solely the enforcement of a federal law, section 227(b)(1)(C), which prohibits the sending of "any" unsolicited fax advertisements, and provides individuals with a private right of action in state courts to enforce the law. The Commerce Clause is not triggered under these circumstances because the injunction merely sought to enforce federal law, and did not improperly seek

to impose California law outside our borders. (See Comment, *The Telephone Consumer Protection Act and Its Burden on Small Business: An Evaluation of the Law and Its Ramifications on Telecommunication Advances* (1999) 28 Cap. U. L. Rev. 223, 242 [the dormant Commerce Clause is "inapplicable" to a state's enforcement of the *federal law* prohibiting unsolicited facsimiles].)

In attempting to avoid this conclusion, USN argues the injunction does improperly import California policies into other states because it is possible that other states have enacted laws permitting *intrastate* unsolicited faxes.

To understand this argument, it is necessary to summarize the federal statutory scheme relating to unsolicited fax advertisements. Section 227(b)(1)(C) sets forth the basic rule: "It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine" Section 227(b)(3) permits private enforcement of this law, and has been interpreted as providing state courts with exclusive jurisdiction over individual actions. (See *Erienet, Inc. v. Velocity Net, Inc.* (3d Cir. 1998) 156 F.3d 513, 516-520; *Intern. Science & Tech. Institute, Inc. v. Inacom Comm.* (4th Cir. 1997) 106 F.3d 1146; *Foxhall Realty Law Offices, Inc. v. Telecom. Prem. Serv.* (2d Cir. 1998) 156 F.3d 432.) Section 227(f) provides a right of action in federal court for state attorneys general to pursue those who violate the act. Section 227(e) states that the federal law does not "preempt any State law that imposes *more restrictive* intrastate requirements" (Italics added.)

Based on this statutory scheme, defendants argue the trial court's injunction reflected an improper intrusion into other state laws because the injunction may compel USN to comply with federal law for intrastate fax advertisements despite that the state may have enacted a law that permits unsolicited faxes to be sent intrastate under certain circumstances. The question whether a state may permit some form of unsolicited intrastate fax transmissions or whether such laws are preempted by section 227 has been subject to conflicting decisions. (See generally Miller, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes* (2000) 52 Fed. Comm. L.J. 667.) But we need not decide this issue here because the trial court's injunction can be limited to avoid this potential problem without altering the substance of the court's order. Specifically, the order will be modified to state that the injunction does not apply to prohibit an intrastate fax that complies with state law and that is not preempted by federal law. With this modification, USN's arguments that the injunction will potentially conflict with other state laws no longer has any possible merit. Because the injunction is merely limiting USN from engaging in activities that it is already prohibited to do, the injunction does not improperly interfere with other states' regulatory schemes.

Finally, we reject USN's contention that the injunction must be reversed because USN was unable to submit additional evidence on remand. Because USN never asked the trial court for the opportunity to submit such additional evidence, it has waived its right to assert error here. In any event, the court's order arose after the parties filed cross-summary judgment motions and it was essentially undisputed that all relevant evidence

was before the trial court. Thus, USN's claimed inability to produce additional evidence was not prejudicial.

We deny NNA's motion for sanctions because USN's appeal was not frivolous.

DISPOSITION

The injunction issued by the trial court shall be modified to add the following language:

This injunction applies to prohibit an unsolicited facsimile *only if* (a) the facsimile was sent to or from California; or (b) defendants directed the transmission of the facsimile from California; or (c) the facsimile was transmitted to a state where NNA conducts seminars or defendants compete with NNA for seminar attendees.

This injunction shall not apply to an unsolicited intrastate facsimile that is lawful under the applicable state law if that law is not preempted by 47 United States Code section 227.

As modified, the judgment is affirmed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.